

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
CENTRAL PUGET SOUND REGION  
STATE OF WASHINGTON

JOHN HENDRICKSON, REBECCA HIRT,  
JUDITH FINN, ANN ANDERSON,  
ELIZABETH MOONEY, ANN HURST, JANET  
HAYS,

Petitioners,

v.

CITY OF KENMORE,

Respondent.

**Case No. 16-3-0002**

**FINAL DECISION AND ORDER**

**SYNOPSIS**

*Petitioners challenged the City's adoption of an amendment to its Public Agency Utility Exception to critical areas regulations. The Board found that there was no scientific evidence in the record to support the action and concluded that the City failed to demonstrate that it included Best Available Science in developing the amendment in violation of RCW 36.70A.172. The Board invalidated the Ordinance and remanded it to the City for action to bring it into compliance.*

**I. INTRODUCTION**

The City of Kenmore adopted critical area regulations in 2006<sup>1</sup> that included an exception for use by a public agency and utility (2006 PAUE) which read as follows:

18.55.160 Exception – Public agency and utility

<sup>1</sup> Index No. 64: Ordinance No 06-0244; Respondent's Brief (September 14, 2016) at 2.

1 A. If the application of this Chapter would prohibit a development proposal by  
2 a public agency or public utility, the agency or utility may apply for an  
3 exception pursuant to this Section.

4 B. Exception request and review process. An applicant for a public agency  
5 and utility exception shall be made to the City and shall include a critical area  
6 report, including mitigation plan, if necessary; and any other related project  
7 documents, such as permit applications to other agencies, special public  
8 agencies and utility exception criteria in Subsection D.

9 C. Director review. The Director shall review the application. The Director  
10 shall approve, approve with conditions, or deny the request based on the  
11 proposal's ability to comply with all of the public agency and utility exception  
12 criteria in Subsection (D).

13 D. Public agency and utility review criteria. The criteria for review and approval  
14 of public agency and utility exceptions follow:

- 15 1. There is no other practical alternative to the proposed development with  
16 less impact on the critical areas; and
- 17 2. The application of this Chapter would unreasonably restrict the ability to  
18 provide utility services to the public.<sup>2</sup>

19 The 2006 PAUE was substantially similar to the model ordinance<sup>3</sup> in the Department  
20 of Commerce (Commerce) Handbook,<sup>4</sup> except that it departed from the agency  
21 recommendation that applications be reviewed by a hearing body or examiner and instead  
22 designated the Director (who would have prepared the recommendation) to review the  
23  
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25 <sup>2</sup> *Id.* at 9.

26 <sup>3</sup> Respondent's Brief at 3-4, 12.

27 <sup>4</sup> Pursuant to RCW 36.70A.190(4), Commerce has established a program of technical assistance that includes  
28 the provision of model ordinances. RCW 36.70A.190(4) reads in pertinent part:

29 (4) The department shall establish a program of technical assistance:

30 (a) Utilizing department staff, the staff of other state agencies, and the technical resources of counties  
31 and cities to help in the development of comprehensive plans required under this chapter. The technical  
32 assistance may include, but not be limited to, model land use ordinances, regional education and  
training programs, and information for local and regional inventories; and

(b) Adopting by rule procedural criteria to assist counties and cities in adopting comprehensive plans  
and development regulations that meet the goals and requirements of this chapter. ...

1 recommendation.<sup>5</sup> The 2006 PAUE also contained a somewhat abridged set of review  
2 criteria, notably failing to include the following additional criteria as recommended by the  
3 Department:

- 4 3. The proposal does not pose an unreasonable threat to the public health,  
5 safety, or welfare on or off the development proposal site;
- 6 4. The proposal attempts to protect and mitigate impacts to critical area  
7 functions and values consistent with the best available science; and
- 8 5. The proposal is consistent with other applicable regulations and standards.

9 In 2007, the City amended the 2006 PAUE to give responsibility for reviewing the  
10 Director's recommendation to the City Manager.<sup>6</sup> In 2012, the City adopted Ordinance No.  
11 12-0334, which updated the City's shoreline plan policies, and revised the PAUE to cover  
12 applications for shoreline exemptions.<sup>7</sup> Kenmore's PAUE applies to all critical areas, not just  
13 wetlands. Critical areas designated in Kenmore include wetlands, streams, fish and wildlife  
14 habitats of importance, geologically hazardous areas, and frequently flooded areas.<sup>8</sup>  
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18 <sup>5</sup> The Board takes official notice of the Washington State Department of Commerce Critical Areas Assistance  
19 Handbook, Appendix A: Example Code Provisions for Designating and Protecting Critical Areas (November  
20 2003, Updated January 2007), pp. A-11 – A-12. See Appendix B to this decision.

21 <sup>6</sup> Respondent's brief at 4.

22 <sup>7</sup> Respondent's brief at 5.

23 <sup>8</sup> Pursuant to WAC 242-03-630(2), the Board takes official notice of City of Kenmore Code Section 18.55.090,  
24 which reads:

25 **18.55.090 Jurisdiction – Critical areas.**

26 A. The *City* shall regulate all *uses*, activities, and *developments* within, adjacent to, or likely to affect  
27 one or more *critical areas*, consistent with *best available science* and the provisions herein.

28 B. *Critical areas* regulated by this chapter include:

- 29 1. *Wetlands* as designated in KMC 18.55.300, Designation and rating of *wetlands*;
- 30 2. *Streams* as designated in KMC 18.55.400, Designation and rating of *streams*;
- 31 3. Fish and wildlife habitats of importance as designated in KMC 18.55.500, Designation of fish and  
32 wildlife habitats of importance;
4. *Geologically hazardous areas* as designated in KMC 18.55.610, Designation of *geologically*  
*hazardous areas*; and
5. Frequently flooded areas as designated in KMC 18.55.700, *Flood hazard areas*.

C. All areas within the *City* meeting the definition of one or more *critical areas*, regardless of any  
formal identification, are hereby designated *critical areas* and are subject to the provisions of this  
chapter.

D. Areas Adjacent to *Critical Areas* Subject to Regulation. Areas adjacent to *critical areas* shall be  
considered to be within the jurisdiction of these requirements and regulations to support the intent of

1 The instant challenge arose when the City Council adopted Ordinance No. 16-0418  
2 (Challenged Ordinance) and again amended its PAUE, changing the *types of projects*  
3 *eligible* for the exemption as follows:

4 D. *Public agency* and *Private Utility Exception Review* Criteria. The criteria for  
5 review and approval of a *public agency* and *or private* utility exception are as  
6 follows:

7 1. There is no other *practical alternatives* to the ~~proposed~~ development  
8 proposal with less impact on the critical areas or buffer; and

9 2. The development proposal benefits the public; and

10 3. Strict application of this chapter would ~~unreasonably~~ restrict or prohibit the  
11 ~~ability to provide utility services to the public~~ development proposal; and

12 1. The development proposal minimizes impacts to the critical areas or  
13 buffer to the maximum extent practical, for example, through placement  
14 of facilities on previously disturbed areas, boring rather than trenching  
15 for utilities, use of pervious or other low impact materials, etc.; and

16 2. The development proposal mitigates impacts to the critical area  
17 functions and values to the maximum extent practical, consistent with  
18 the best available science and with the objective of not net loss of  
19 critical area functions and values. For impacts to wetlands, the  
20 development proposal should strive to meet the mitigation performance  
21 standards outlined in KMC Sections 18.55.330(G) and 18.55.330(H).<sup>9</sup>

22 **Procedural matters relevant to the case are detailed in Appendix A.**

23 **Appendix B sets forth pertinent Dept. of Commerce Example Code Provisions.**

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26  
27 this chapter and ensure protection of the *functions and values* of *critical areas*. "Adjacent" shall mean  
any activity located:

- 28 1. On a *site* immediately adjoining a *critical area*;  
29 2. A distance equal to or less than the required *critical area buffer* width and building *setback*;  
30 3. A distance equal to or less than one-half mile (2,640 feet) from a bald eagle nest;  
31 4. A distance equal to or less than 900 feet from the closest nest of a heron rookery; or  
32 5. Within the floodway, *floodplain* or channel migration zone. [Ord. 11-0329 § 3 (Ex. 1).]

<sup>9</sup> I-25 at 4. The italics demonstrate a word or phrase that is defined in the zoning code. The "track-changes"  
reflect the changes made to the 2006 PAUE.

## II. BURDEN OF PROOF AND STANDARD OF REVIEW

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption. This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the City is not in compliance with the GMA.

The Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant plans and development regulations.<sup>10</sup> The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.<sup>11</sup> The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA. The Board shall find compliance unless it determines that the County's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA. RCW 36.70A.320(3). In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1, 121 Wn.2d 179, 201 (1993)*.

## III. BOARD JURISDICTION

The Board finds the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2). The Board finds the Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2)(a) and (b) and RCW 36.70A.210(6). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

## IV. ANALYSIS AND DISCUSSION

**Issue No. 1.** Does Ordinance 16-0418 fail to comply with RCW 36.70A.172(1), RCW 36.70A.010, and RCW 36.70A.020(9), (10), and (11) because it expands the application of the City's public agency utility exception to critical areas rules from only

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<sup>10</sup> RCW 36.70A.280, RCW 36.70A.302.

<sup>11</sup> RCW 36.70A.290(1).

1 regional city utility improvements to a broad based exception for any desired city  
2 project?

3 **Issue No. 2.** Does Ordinance 16-0418 fail to comply with RCW 36.70A.172(1)  
4 because the expansion of the public agency utility exception to critical areas rules is  
5 not balanced with an equally broad expansion of regulations that show that by using  
6 best available science it has tailored the exemption to reasonably ameliorate  
7 potential harm to the environment and fish and wildlife, including the potential  
8 downstream effects of unearthing an underground spring?

9 **Issue No. 3.** Does Ordinance 16-0418 fail to comply with the GMA because the  
10 record shows a clear legislative intent to change the critical area exception rules to  
11 allow construction of a ballfield in careless disregard for the goals and requirements  
12 of RCW 36.70A.172(1), RCW 36.70A.010, and RCW 36.70A.020(9), (10), and (11)?

13 Although perhaps inartfully worded, taken together these issues ask whether the  
14 City's expansion of the exception to CAO development regulations from *public utilities* to  
15 *public agencies and utilities* fails to comply with **RCW 36.70A.010, RCW 36.70A.020(9),**  
16 **(10), and (11), and RCW 36.70A.172(1).** Where Petitioners' briefing of the issues  
17 overlapped and ran together, the Board considers the issues together and divides the  
18 discussion according to the alleged statutory violations.

## 19 **Compliance with Legislative Findings**

### 20 **RCW 36.70A.010 Legislative findings.**

21 The legislature finds that uncoordinated and unplanned growth, together with  
22 a lack of common goals expressing the public's interest in the conservation  
23 and the wise use of our lands, pose a threat to the environment, sustainable  
24 economic development, and the health, safety, and high quality of life enjoyed  
25 by residents of this state. It is in the public interest that citizens, communities,  
26 local governments, and the private sector cooperate and coordinate with one  
27 another in comprehensive land use planning. Further, the legislature finds that  
28 it is in the public interest that economic development programs be shared with  
29 communities experiencing insufficient economic growth.

1 **Positions of the Parties**

2 Petitioners complain that the City Council failed to carefully consider “facts and  
3 circumstances in a cooperative and coordinated comprehensive planning procedure”<sup>12</sup>  
4 because the City was motivated by a desire to “take control of a ballfield at St. Edwards State  
5 Park.”<sup>13</sup> According to Petitioners, the City believed it needed to rush to move that project  
6 forward to take advantage of “leverage” over State Parks, which was awaiting zoning  
7 changes and SEPA approvals to develop another project. Petitioners’ arguments are  
8 unavailing.  
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11 **Board Discussion**

12 RCW 36.70A.010 describes the legislature’s findings that support the GMA and  
13 explains that “[i]t is in the public interest that citizens, communities, local governments, and  
14 the private sector cooperate and coordinate with one another in comprehensive land use  
15 planning.” That statute, however, does not contain specific requirements with which a city  
16 or county must comply. The Board has long held that legislative findings do not create  
17 legally binding obligations; rather, duties of compliance are created by the substantive  
18 provisions of a statute.<sup>14</sup> In the absence of an obligation, **the Board finds** that Petitioners  
19 cannot carry their burden to show that the City failed to comply with RCW 36.70A.010.  
20  
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22 **Compliance with GMA Goals**

23 **RCW 36.70A.020 Planning goals.**

24 (9) Open space and recreation. Retain open space, enhance recreational  
25 opportunities, conserve fish and wildlife habitat, increase access to natural  
26 resource lands and water, and develop parks and recreation facilities.

27 (10) Environment. Protect the environment and enhance the state's high  
28 quality of life, including air and water quality, and the availability of water.  
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30 <sup>12</sup> Petitioners Prehearing Brief (August 24, 2016) at 1.

31 <sup>13</sup> *Id.* at 1 – 2.

32 <sup>14</sup> *Governors Point Development Company, et al. v. Whatcom County*, GMHB No. 11-2-0010c (Compliance Order and Order Following Remand, January 4, 2013) at 67.

1 (11) Citizen participation and coordination. Encourage the involvement of  
2 citizens in the planning process and ensure coordination between  
3 communities and jurisdictions to reconcile conflicts.

4 (12) Public facilities and services. Ensure that those public facilities and  
5 services necessary to support development shall be adequate to serve the  
6 development at the time the development is available for occupancy and use  
7 without decreasing current service levels below locally established minimum  
8 standards.

### 9 **Positions of the Parties**

10 Petitioners allege "multiple violations" of RCW 36.70A.020(11) regarding citizen  
11 participation in planning,<sup>15</sup> asserting the City did not include DOE in the review of the  
12 Ordinance and so "left the public uniformed and unable to fully or reasonably participate."<sup>16</sup>  
13 Petitioners also assert that information provided by staff was, in Petitioners' view, "highly  
14 inaccurate."<sup>17</sup> The City responds with Exhibit I-1, a January 15, 2016, letter from Commerce  
15 acknowledging that it had received the draft amendment and forwarded it to other state  
16 agencies.<sup>18</sup> The Department of Ecology (Ecology or DOE) acknowledged receipt of the  
17 Notice.<sup>19</sup>

18 Petitioners do not allege substantive failure to comply with the public notice  
19 provisions of RCW 36.70A.035(2) and it is apparent from the record that Ecology was  
20 notified, although the agency did not respond to the notice until long after the Challenged  
21 Ordinance had been adopted. Nevertheless, Petitioners complain:

22 It is common knowledge that both the DOE and DOC are short-staffed, and  
23 sometimes cannot respond to such notices within a matter of weeks.

24 Under WAC 365-195-910(1) the city could have contacted DOE and DOC for  
25 a consultation when they failed to hear back from them in a timely manner.

26 Under the circumstances, such a consultation would be prudent regarding the  
27 use of best available science and the appropriateness of their expanded  
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29 <sup>15</sup> Petitioners' Prehearing Brief at 6.

30 <sup>16</sup> *Id.* at 4.

31 <sup>17</sup> Petitioners' Prehearing Brief at 6-7.

32 <sup>18</sup> City's Brief at 6; Exhibit I-1.

<sup>19</sup> Exhibit Supp-79: Email from Ecology to Lauri Anderson, Kenmore Senior Planner (July 12, 2016).



1 regulation (especially since the city chose not to hire qualified scientific  
2 experts.)

3 The city chose not to do so, with a curious lack of due diligence. Instead, their  
4 presentation in the index of the record gives the appearance of filing  
5 compliance and approval from the DOC (who is responsible for coordinating  
6 with the DOE.)<sup>20</sup>

7 Violation of [RCW 36.70A.020(11)]regarding citizen participation in planning,  
8 plus coordination between communities and jurisdictions to reconcile conflicts  
9 has multiple violations.

10 Not including DOE in the review process undermined the participation of  
11 everyone involved.<sup>21</sup>

12 The City Council held public hearings on the proposed PAUE amendment on  
13 February 22, 2016, and March 28, 2016, took public testimony, and considered staff  
14 information.<sup>22</sup> Petitioners have not alleged that the public hearings were not properly  
15 noticed.

## 16 **Board Discussion**

17 Petitioners seem to conflate public participation in the process with prevailing as to  
18 the legislative outcome, but participation is no guarantee that participants will ultimately get  
19 their way. In the briefs and arguments at the hearing on the merits, they restated their  
20 concern that the PAUE amendment was motivated by desires to expand the ballfield at St.  
21 Edwards State Park – a project they believe will do environmental harm. Petitioners  
22 provided no authority to support the relevance of the Council's alleged motivation to the  
23 Board's determination of whether the PAUE amendment complies with the public  
24 participation goals and requirements of the GMA. Petitioners' assertion that the City *could*  
25 *have* followed up with Ecology and that such a consultation would be *prudent* does not  
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30 <sup>20</sup> Petitioners' Reply at 3.

31 <sup>21</sup> Petitioners Prehearing Brief at 6.

32 <sup>22</sup> Respondent's Brief at 7-8; Exhibits I-9 and I-16: Respective Council Meeting Agendas and Materials.

1 suffice to overcome the presumption of validity and prove the City failed to comply with a  
2 *requirement* of the GMA, which is the Petitioners' burden under RCW 36.70A.320.<sup>23</sup>

3 Petitioners did not brief their allegation that the City failed to comply with RCW  
4 36.70A.020(9) or RCW 36.70A.020(12) and those issues are deemed abandoned.

5 **The Board finds** Petitioners have not carried their burden to show the City failed to  
6 comply with the goals of the GMA in RCW 36.70A.020(9), (11), or (12). That said, the  
7 Board is persuaded that Petitioners raise a valid point as to the City's responsibility to  
8 consider the Best Available Science (BAS) pursuant to RCW 36.70A.172 in amending its  
9 development regulations pertaining to Critical Areas.

10 GMA Goal (10) is stated in the directive, not the suggestive: "*Protect* the environment  
11 and enhance the state's high quality of life, including air and water quality, and the  
12 availability of water."<sup>24</sup> In order to comply with this directive, the GMA requires jurisdictions  
13 to enact development regulations to protect the functions and values of critical areas. As  
14 will be discussed below, the City failed to comply with RCW 36.70A.172 in adopting  
15 development regulations to protect critical areas. Therefore, **the Board finds** that the City  
16 has failed to comply with RCW 36.70A.020(10).  
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## 20 **Best Available Science**

21 The GMA requires all counties and cities to designate critical areas.<sup>25</sup> Having  
22 designated critical areas, including wetlands, counties and cities must adopt development  
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25 <sup>23</sup> RCW 36.70A.320 reads in pertinent part:

26 (2) ... [T]he burden is on the petitioner to demonstrate that any action taken by a state agency,  
27 county, or city under this chapter is not in compliance with the requirements of this chapter.

28 (3) In any petition under this chapter, the board, after full consideration of the petition, shall  
29 determine whether there is compliance with the requirements of this chapter. In making its  
30 determination, the board shall consider the criteria adopted by the department under RCW  
31 36.70A.190(4). The board shall find compliance unless it determines that the action by the state  
32 agency, county, or city is clearly erroneous in view of the entire record before the board and in light  
of the goals and requirements of this chapter.

<sup>24</sup> RCW 36.70A.020(10).

<sup>25</sup> RCW 36.70A.170(1)(d).

1 regulations to protect the identified critical areas. RCW 36.70A.060(2) reads in pertinent  
2 part:

3 (2) Each county and city shall adopt development regulations that protect  
4 critical areas that are required to be designated under RCW 36.70A.170.  
5 **RCW 36.70A.172 Critical areas—Designation and protection—Best**  
6 **available science to be used.**

7 (1) In designating and protecting critical areas under this chapter, counties and  
8 cities shall include the best available science in developing policies and  
9 development regulations to protect the functions and values of critical  
10 areas. In addition, counties and cities shall give special consideration to  
11 conservation or protection measures necessary to preserve or enhance  
12 anadromous fisheries. (Emphasis added.)

13 The BAS requirement in .172 is further amplified by the critical areas administrative  
14 code sections in WAC 365-195:

15 **WAC 365-195-900 Background and purpose.**

16 (2) Counties and cities must include the "best available science" when  
17 developing policies and development regulations to protect the functions  
18 and values of critical areas . . . (Emphasis added.)

19 **WAC 365-195-905 Criteria for determining which information is the "best**  
20 **available science."**

- 21 (1) This section provides assessment criteria to assist . . . cities in determining  
22 whether information obtained during development of critical areas policies  
23 and regulations constitutes the "best available science." ...  
24 (3) The responsibility for including the best available science in the  
25 development and implementation of critical areas policies or regulations  
26 rests with the legislative authority . . . (Emphasis added.)

27 **WAC 365-195-915 Criteria for including the best available science in**  
28 **developing policies and development regulations.**

29 (1) To demonstrate that the best available science has been included in the  
30 development of critical areas policies and regulations, counties and cities  
31 should address each of the following on the record:

32 (a) The specific policies and development regulations adopted to protect the  
functions and values of the critical areas at issue.

(b) The relevant sources of best available scientific information included in the  
decision-making.

(c) Any nonscientific information—including legal, social, cultural, economic, and political information—used as a basis for critical area policies and regulations that depart from recommendations derived from the best available science. A county or city departing from science-based recommendations should:

(i) Identify the information in the record that supports its decision to depart from science-based recommendations;

(ii) Explain its rationale for departing from science-based recommendations; and

(iii) Identify potential risks to the functions and values of the critical area or areas at issue and any additional measures chosen to limit such risks. State Environmental Policy Act (SEPA) review often provides an opportunity to establish and publish the record of this assessment. (Emphasis added.)

Additionally, the legislature directed Commerce to provide technical assistance to local governments developing comprehensive plans. **RCW 36.70A.190(4)** reads in pertinent part:

(4) The department shall establish a program of technical assistance:

(a) Utilizing department staff, the staff of other state agencies, and the technical resources of counties and cities to help in the development of comprehensive plans required under this chapter. The technical assistance may include, but not be limited to, model land use ordinances, regional education and training programs, and information for local and regional inventories; ...

## Positions of the Parties

Petitioners allege that the City's action was intended to allow development of a ballfield in St. Edwards State Park which would destroy wetlands, amphibian habitat, other bio-diversity elements, and an underground spring.<sup>26</sup> The parties agree that, in 2009, a City Attorney interpretation determined that the PAUE only exempted projects related to utility services from compliance with critical areas regulations.<sup>27</sup> The City insists that its 2016 action to amend the PAUE was initiated "to address an interpretation that limits the scope of

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<sup>26</sup> PFR at 2.

<sup>27</sup> Exhibit I-35: City Council Agenda Materials (January 26, 2015), 2015 Annual Planning Commission Work Plan Docket, p. 10 (also paginated as p. 24 of 91).

1 this exception beyond the original intent.”<sup>28</sup> Thus the City posits that the application section  
2 of both the Commerce model ordinance and the 2009 Code appear to include all  
3 development proposals of a public agency or public utility,<sup>29</sup> but such broad applicability is  
4 limited by decision criteria that allow the exception only for projects in which “the application  
5 of the Chapter [KMC 18.55] would unreasonably restrict the ability *to provide utility services*  
6 *to the public.*”<sup>30</sup> The City maintains clarification was needed and, in 2015, City Staff  
7 proposed “to rewrite this section to address the original intent, which was to allow the PAUE  
8 exemption for City (or other public agency) projects, not just utilities.”<sup>31</sup>  
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10       Petitioners also allege that the City did not research or apply best available science  
11 (BAS) in developing a policy and regulation for this ordinance and that the Challenged  
12 Ordinance allows critical area destruction, including water quality without consideration of  
13 BAS.<sup>32</sup> As evidence, Petitioners offer council meeting transcripts discussing the need to  
14 encroach on a wetland in order to expand the ballfields,<sup>33</sup> photographs from the St. Edwards  
15 State Park Field Improvements Critical Area Report,<sup>34</sup> which they suggest are evidence of  
16 an underground spring, and allegations that the area is a wetland that *may* provide habitat  
17 for Red-Legged Frogs.<sup>35</sup> The City responds that it “fully complied with the GMA” when it (1)  
18 designated and protected critical areas and adopted regulations that have included a PAUE  
19 since 2006 and then (2) utilized the Commerce model ordinance as a template for its critical  
20 area regulations, asserting that the model ordinance constitutes BAS such that relying on it  
21 suffices to show that the City “included” BAS. In amending the PAUE to expand the types  
22 of projects eligible for the exemption, the City also adopted additional criteria from the  
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26 <sup>28</sup> City's Brief at 5, citing Exhibit I-35 at 7 (also paginated as p. 21 of 91).

27 <sup>29</sup> City Brief at 6; See I-64 at 9 (KMC 18.55.160.A), the 2006 PAUE: “If the application of this Chapter would  
28 prohibit a development proposal by a public agency or public utility, the agency or utility may apply for an  
29 exception pursuant to this Section.” (Emphasis added).

30 <sup>30</sup> *Id.* (Emphasis added).

31 <sup>31</sup> City's Brief at 5, citing Exhibit I-35 at 7.

32 <sup>32</sup> Petitioners' Prehearing Brief at 6-7.

33 <sup>33</sup> Exhibit I-52.

34 <sup>34</sup> Exhibit Supp-74 (March 2008).

35 <sup>35</sup> Petitioners' Prehearing Brief at 4-5.

Commerce model ordinance pertaining to minimizing and mitigating environmental impacts.<sup>36</sup>

### Board Discussion

A basic disconnect between the parties' arguments is that Petitioners' focus their arguments on the environmental consequences of expansion of a ballfield as the likely result of the expanded projects that would be exempted from the City's Critical Area Ordinance (CAO). While their concerns may be valid, the question before the Board relates to the environmental consequences of amending the PAUE, which applies to all of the City's critical areas, and not to the more speculative consequences of a subsequent expansion of a ballfield. Regardless, as discussed *supra*, the City's intent does not bear on whether the Challenged Ordinance complies with the GMA.

Petitioners' allegations that the City failed to include BAS in violation of RCW 36.70A.172 are another matter. There is no dispute that the Challenged Ordinance amended the City's development regulations pertaining to the protection of critical areas and thus the City must comply with .172's requirement that it "include" BAS in developing the new policies.

The Court of Appeals in *HEAL* held that BAS must be included in the record and considered in the development of critical areas regulations,<sup>37</sup> determining that the purpose of the BAS requirement is to ensure that critical areas regulations are not based on speculation and surmise, but on meaningful, reliable, relevant evidence.<sup>38</sup> The *HEAL* Court went on to explain that critical areas

... are deemed critical because they may be more susceptible to damage from development. The nature and extent of this susceptibility is a uniquely scientific inquiry. It is one in which the best available science is essential to an accurate decision about what policies and regulations are necessary to

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<sup>36</sup> Exhibit I-9.

<sup>37</sup> *Honesty in Env'tl. Analysis & Legislation (HEAL) v. CPSGMHB*, 96 Wn. App. 522, 532, 979 P.2d 864 (1999).

<sup>38</sup> *Heal*, 96 Wn. App. at 531.

1 mitigate and will in fact mitigate the environmental effects of new  
2 development.<sup>39</sup>

3 Subsequently, in *Ferry County*, the Supreme Court cited with approval the Western  
4 Washington Board's formulation of considerations for determining whether BAS was  
5 included in local CAO decisions.<sup>40</sup> The Court noted that the Western Board would consider  
6 claims regarding BAS on an individual basis with these factors in mind:  
7

8 (1) The scientific evidence contained in the record;

9 (2) Whether the analysis by the local decision-maker of the scientific evidence and  
10 other factors involved a reasoned process; and

11 (3) Whether the decision made by the local government was within the parameters of  
12 the Act as directed by the provisions of RCW 36.70A.172(1).

13 Thus the question before the Board is, Did the City "demonstrate" that it included  
14 BAS? The City asserts that it did because it relied on the model ordinance provided by  
15 Commerce in the Critical Areas Handbook. WAC 365-195-910 reads in pertinent part:  
16

17 **State natural resource agencies provide numerous guidance documents**  
18 **and model ordinances that incorporate the agencies' assessments of the**  
19 **best available science.** [Commerce] can provide technical assistance in  
20 obtaining such information from state natural resources agencies, **developing**  
21 **model GMA-compliant critical areas policies and development**  
22 **regulations,** and related subjects.  
(Emphasis added.)

23 First, the model ordinances that WAC 365-195-910 describes as *incorporating the*  
24 *agencies' assessments* of BAS are from natural resource agencies. Commerce's technical  
25 assistance is aimed at developing model GMA-compliant critical area policies, but the WAC  
26 does not go so far as to say that Commerce's model ordinances *are* the best and most  
27 current science available. The Board does not decide at this juncture that adopting  
28 Commerce's model ordinances suffices to show that a jurisdiction has included BAS but,  
29

30 <sup>39</sup> *Heal*, 96 Wn .App. at 532-533.

31 <sup>40</sup> *Friends of Ferry County, et al. v. WWGMHB (Ferry County)*, 155 Wn.2d 824, 834, 123 P.3d 102 (2005)  
32 at 834.

1 assuming *arguendo* that it does, the next analysis would be whether the City of Kenmore  
2 has adopted the department's model ordinance.

3 The City insists that its 2016 action to amend the PAUE was initiated "to address an  
4 interpretation that limits the scope of this exception beyond the original intent."<sup>41</sup> The Board  
5 agrees that the decision criteria in the model PAUE and the City's PAUE (as last amended  
6 in 2012) limit the applicability section, but the Board disagrees that the City's change is a  
7 mere clarification.<sup>42</sup> The two sections are not merely "unclear." The decision criteria section  
8 acts to limit the applicability section. Thus the sections are conflicting, and the City's action  
9 resolves the conflict by significantly expanding the kinds of projects eligible for exemption  
10 from critical areas regulations.  
11

12 Further, although the City did strengthen the criteria for minimizing and mitigating  
13 environmental impacts to more closely follow Commerce's model ordinance, it specifically  
14 amended the section describing eligible projects so that it does *not* follow the model  
15 ordinance – presumably because the model is subject to the same interpretation reached by  
16 the City regarding its own exemption/exception regulation: the review criteria in the model  
17 ordinance refer to the unreasonable restriction of "the ability to provide utility services to the  
18 public." The new PAUE does not "mirror" the model ordinance. Therefore, whether or not  
19 the model ordinance satisfies the need to show the inclusion of BAS (and the Board has not  
20 decided that it does), the City has deviated from the model ordinance. Thus, the City may  
21 not rest its compliance with .172 on use of the model ordinance.  
22  
23

24 The Board must yet determine whether BAS was included in developing the  
25 amended PAUE. We assume BAS was included when the City adopted its CAO, including  
26 its PAUE exception. It is now crafting an expansion of that exception. That expansion  
27 departs from BAS precisely because it expands the number of projects that could be  
28  
29

30  
31 <sup>41</sup> City's Brief at 5, citing Exhibit I-35 at 7 (also paginated as p. 21 of 91).

32 <sup>42</sup> As the Board previously noted, original "intent" is not relevant. Beyond that, the City provided no evidence of the original intent of either the City or Commerce.



1 exempted from regulations that protect critical areas from utility service to any public agency  
2 or private utility project.

3 It is well-settled that local governments retain discretion in making decisions within  
4 the structure of RCW 36.70A.172, which is why the Board and Courts have refused to  
5 establish a bright-line definition of BAS.<sup>43</sup> Instead, the Board looks to the factors set forth by  
6 the Board in *1000 Friends v. Anacortes*,<sup>44</sup> and noted by the state Supreme Court in *Ferry*  
7 *County v. Concerned Friends*.<sup>45</sup> Those factors are:

9 (1) The scientific evidence contained in the record;

10 (2) Whether the analysis by the local decision-maker of the scientific evidence  
11 and other factors involved a reasoned process; and

12 (3) Whether the decision made by the local government was within the  
13 parameters of the Act as directed by the provisions of RCW 36.70A.172(1).

14 Thus the question becomes, "Did the City provide the necessary reasoned analysis  
15 of the scientific evidence in the record?"

16 In sum, to satisfy the requirements of .172, the City would, at a minimum, need to go  
17 through the process outlined in WAC 365-195-915 and provide a reasonable justification for  
18 deviating from BAS in accordance with WAC 365-195-915 (1)(c)(i)-(iii). The record before  
19 the Board contains no scientific evidence. The City's Responsible Official issued a  
20 Determination of Non-significance (DNS) under SEPA.<sup>46</sup> In answer to the SEPA Checklist  
21 query, "List any environmental information you know about that has been prepared, or will  
22 be prepared, directly related to this proposal," the City answered, "None."<sup>47</sup> The description  
23 of the proposal from the City was as follows:

24 The PAUE amendments are to clarify a Zoning Code section that has been in  
25 place since at least 2006. A legal interpretation in 2009 determined that

26  
27  
28 <sup>43</sup> *Id.*

29 <sup>44</sup> *1000 Friends v. Anacortes*, GMHB No. 03-2-0017 (February 10, 2004) (quoting the three factors established  
30 in *Clark County Natural Res. Council*).

31 <sup>45</sup> 155 Wn.2d 824, 835, 123 P.3d 102, 2005 Wash. LEXIS 922 (Wash. 2005)

32 <sup>46</sup> Respondent's Brief at 6; Exhibit I-3: SEPA DNS (February 8, 2016).

<sup>47</sup> Exhibit I-2 at 3 (also paginated as page 2 of 18).

1 although the intent of the exemption was to address both public agency and  
2 public utility activities, the language as written, addressed only public utilities.<sup>48</sup>

3 **The Board finds** that the City failed to include an analysis of environmental impacts  
4 of amending the PAUE or to provide a “reasoned analysis” that explains how expanding the  
5 kinds of projects exempted from critical area regulations can be done without impacting the  
6 functions and values of those areas.

7 **The Board concludes** that the City’s action in adopting Ordinance 16-0418 was  
8 clearly erroneous in view of the record before the Board and the goals and requirements of  
9 GMA.

10 **The Board finds and concludes** that Ordinance 16-0418 does not comply with  
11 RCW 36.70A.172.

### 13 Invalidity

14 Petitioners’ argue that the Challenged Ordinance allows critical area destruction,  
15 including water quality degradation<sup>49</sup> in substantial interference with RCW 36.70A.020(10)  
16 and asks that Board to Invalidate Ordinance 16-0418. Failure to include BAS in developing  
17 critical area regulations constitutes substantial interference with Goal (10), which is stated in  
18 the directive, not the suggestive: “*Protect* the environment and enhance the state's high  
19 quality of life, including air and water quality, and the availability of water.”<sup>50</sup> **The Board**  
20 **finds** that the City has failed to comply with RCW 36.70A.020(10).

21 Invalidity is a discretionary remedy available to the Board when a city or county takes  
22 action which not only fails to comply with the GMA but substantially interferes with the goals  
23 of the Act.<sup>51</sup> RCW 36.70A.320, concerning invalidity, reads in pertinent part:

24 (2) In any petition under this chapter, the board, after full consideration of the  
25 petition, shall determine whether there is compliance with the requirements  
26 of this chapter. In making its determination, the board shall consider the

29  
30 <sup>48</sup> Exhibit I-2 at 4 (also paginated as page 3 of 18).

31 <sup>49</sup> Petitioners’ Prehearing Brief at 6.

32 <sup>50</sup> RCW 36.70A.020(10).

<sup>51</sup> *Friends of the San Juans v. San Juan County*, GMHB No. 10-2-0012 (FDO, October 12, 2010) at 37.

1 criteria adopted by the department under RCW 36.70A.190(4). The board  
2 shall find compliance unless it determines that the action by the state  
3 agency, county, or city is clearly erroneous in view of the entire record  
4 before the board and in light of the goals and requirements of this chapter.

5 Having found that the City's action was clearly erroneous in view of the record and  
6 that Ordinance 16-0418 fails to comply RCW 36.70A.172, and in view of the likelihood that  
7 continued validity of Ordinance 16-0418 will result in the City exempting projects from  
8 regulations designed to protect critical areas, the Board decides that Ordinance 16-0418  
9 substantially interferes with RCW 36.70A.020(10) (Goal 10 of the GMA). **Ordinance 16-**  
10 **0418 is declared invalid.**

## 11 12 V. ORDER

13 Based upon review of the Petition for Review, the briefs and exhibits submitted by the  
14 parties, the GMA, prior Board orders and case law, having considered the arguments of the  
15 parties, and having deliberated on the matter, the Board Orders:

- 16 • The City failed to include BAS in its adoption of Ordinance 16-0418.
- 17 • The City failed to include an analysis of environmental impacts of amending the  
18 PAUE.
- 19 • The City failed to provide a "reasoned justification" for departure from BAS as  
20 none was included in the record.
- 21 • The City failed to explain how expanding the kinds of projects exempted from  
22 critical area regulations can be done without impacting the functions and values of  
23 critical areas in violation of RCW 36.70A.172.
- 24 • Ordinance 16-0418 fails to comply with RCW 36.70A.020(10).
- 25 • Ordinance 16-0418 substantially interferes with RCW 36.70A.020(10) (Goal 10 of  
26 the GMA).
- 27 • Ordinance 16-0418 is invalid.
- 28 • Ordinance 16-0418 is remanded to the City for action to comply with GMA.
- 29
- 30
- 31
- 32

- 1       • The compliance schedule shall be as set forth below:

2

Item	Date Due
3 Compliance Due	May 30, 2017
4 Compliance Report/Statement of Actions Taken to	June 13, 2017
5 Comply and Index to Compliance Record	
6 Objections to a Finding of Compliance	June 27, 2017
7 Response to Objections	July 7, 2017
8 <b>Telephonic Compliance Hearing</b>	<b>July 17, 2017</b>
9 1 (800) 704-9804 and use pin code 4472777#	<b>10:00 AM</b>

10       Length of Briefs – A brief of 15 pages or longer shall have a table of exhibits. WAC  
11 242-03-590(3) states: “Clarity and brevity are expected to assist a board in meeting its  
12 statutorily imposed time limits. A presiding officer may limit the length of a brief and impose  
13 format restrictions.” **Compliance Report/Statement of Actions Taken to Comply shall**  
14 **be limited to 15 pages, 20 pages for Objections to Finding of Compliance, and 5**  
15 **pages for the Response to Objections.**

16  
17  
18       SO ORDERED this 28th day of November, 2016.

19  
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21 \_\_\_\_\_  
22 Cheryl Pflug, Board Member

23  
24 \_\_\_\_\_  
25 Deb Eddy, Board Member

26  
27 \_\_\_\_\_  
28 William Roehl, Board Member

1 **Note: This is a final decision and order of the Growth Management Hearings Board**  
2 **issued pursuant to RCW 36.70A.300.<sup>52</sup>**  
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28 <sup>52</sup> Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all  
29 parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.

30 A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days  
31 as provided in RCW 34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be  
32 served on the board but it is not necessary to name the board as a party. See RCW 36.70A.300(5) and WAC  
242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the  
Growth Management Hearings Board is not authorized to provide legal advice.

## Appendix A: Procedural matters

On May 31, 2016, John Hendrickson, Rebecca Hirt, Judith Finn, Ann Anderson, Elizabeth Mooney, Ann Hurst, and Janet Hays (Petitioners) filed a petition for review. The petition was assigned Case No. 16-3-0002.

A prehearing conference was held telephonically on June 28, 2016. Petitioners John Hendrickson, Rebecca Hirt, Judith Finn, Ann Anderson, Elizabeth Mooney, Ann Hurst, and Janet Hays appeared as *pro se*. Respondent City of Kenmore (the City) appeared through its attorneys Dawn Reitan and Curtis Chambers.

On July 14, 2016, Petitioners filed a Motion to Supplement the Record with numerous documents related to the City's 2009 consideration of an amendment to its PAUE. The City responded on July 25, 2016, objecting to the motion to supplement. Petitioners' Motion to Supplement the Record was granted in part and denied in part.<sup>53</sup>

On August 24, 2016, Petitioners filed a Motion to Supplement the Record with an email from Ecology to the City responding to Kenmore's proposal to adopt Ordinance No. 16-0418. Petitioners' Motion to Supplement the Record was granted.<sup>54</sup>

On September 28, 2016, Petitioners filed a Motion to Supplement the Index of Record with two emails from City Councilman and Lobbyist.<sup>55</sup> At the hearing on the merits, the presiding officer ruled orally that the emails were not helpful or of substantial assistance to the Board. Petitioners' motion to supplement the record with proposed exhibits Supp-80 and Supp-81 was **denied**.

The Briefs and exhibits of the parties were timely filed and are referenced in this order as follows:

- Petitioners' Prehearing Brief, August 24, 2016 (Petitioners' Brief);
- City of Kenmore's Prehearing Brief, September 14, 2016 (Response Brief);
- Declaration of Lauri Anderson, September 14, 2016 (Decl. L. Anderson);

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<sup>53</sup> Order on Motion to Supplement the Record (August 11, 2016).

<sup>54</sup> Order on Motion to Supplement the Record (September 14, 2016).

<sup>55</sup> Petitioners' Reply at 5-6.

- Petitioners' Reply Brief, September 28, 2016 (Reply Brief);

### Hearing on the Merits

The hearing on the merits was convened October 10, 2016. Present were Petitioners John Hendrickson, Judith Finn, Ann Anderson, Ann Hurst, and Janet Hays and John Hendrickson presented their arguments. Dawn Reitan appeared as counsel for the City. Also in attendance were Patrick O'Brien and Lauri Anderson.

The hearing afforded each party the opportunity to emphasize the most important facts and arguments relevant to its case. Board members asked questions seeking to thoroughly understand the history of the proceedings, the important facts in the case, and the legal arguments of the parties.

## Appendix B: Commerce Guidebook

### Example Code Provisions

#### **X.10.090 Jurisdiction – Critical Areas**

A. The [city/county] shall regulate all uses, activities, and developments within, adjacent to, or likely to affect, one or more critical areas, consistent with the best available science and the provisions herein.

**D. Areas Adjacent to Critical Areas Subject to Regulation.** Areas adjacent to critical areas shall be considered to be within the jurisdiction of these requirements and regulations to support the intent of this Title and ensure protection of the functions and values of critical areas. Adjacent shall mean any activity located:

#### **X.10.100 Protection of Critical Areas**

Any action taken pursuant to this Title shall result in equivalent or greater functions and values of the critical areas associated with the proposed action, as determined by the best available science. All actions and developments shall be designed and constructed in accordance with *Mitigation Sequencing* [Section X.10.240] to avoid, minimize, and restore all adverse impacts. Applicants must first demonstrate an inability to avoid or reduce impacts, before restoration and compensation of impacts will be allowed. No activity or use shall be allowed that results in a net loss of the functions or values of critical areas.

### **BEST AVAILABLE SCIENCE**

#### **X.10.110 Best Available Science**

**A. Protect Functions and Values of Critical Areas With Special Consideration to Anadromous Fish.** Critical area reports and decisions to alter critical areas shall rely on the best available science to protect the functions and values of critical areas and must give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fish, such as salmon and bull trout, and their habitat.

#### **X.10.140 Exception – Public Agency and Utility**

A. If the application of this Title would prohibit a development proposal by a public agency or public utility, the agency or utility may apply for an exception pursuant to this Section.



1 **B. Exception Request and Review Process.** An application for a public  
2 agency and utility exception shall be made to the [city/county] and shall  
3 include a critical area identification form; critical area report, including  
4 mitigation plan, if necessary; and any other related project documents, such as  
5 permit applications to other agencies, special studies, and environmental  
6 documents prepared pursuant to the State Environmental Policy Act (Chapter  
7 43.21C RCW). The [director] shall prepare a recommendation to the [hearing  
8 body/examiner] based on review of the submitted information, a site  
inspection, and the proposal's ability to comply with public agency and utility  
exception review criteria in Subsection (D).

9 **C. [Hearing Body/Examiner] Review.** The [hearing body/examiner] shall  
10 review the application and [director]'s recommendation, and conduct a public  
11 hearing pursuant to the provisions of the [applicable city/county chapter]. The  
12 [hearing body/examiner] shall approve, approve with conditions, or deny the  
13 request based on the proposal's ability to comply with all of the public agency  
14 and utility exception criteria in Subsection (D).

15 **D. Public Agency and Utility Review Criteria.** The criteria for review and  
16 approval of public agency and utility exceptions follow:

- 17 1. There is no other practical alternative to the proposed development with  
18 less impact on the critical areas;
- 19 2. The application of this Title would unreasonably restrict the ability to  
20 provide utility services to the public;
- 21 3. The proposal does not pose an unreasonable threat to the public  
22 health, safety, or welfare on or off the development proposal site;
- 23 4. The proposal attempts to protect and mitigate impacts to the critical  
24 area functions and values consistent with the best available science;  
and
- 25 5. The proposal is consistent with other applicable regulations and  
standards.

26 **E. Burden of Proof.** The burden of proof shall be on the applicant to bring  
27 forth evidence in support of the application and to provide sufficient  
28 information on which any decision has to be made on the application.

29 *Allowed activities are similar to exemptions in that they do not require critical  
30 area review. However, unlike exemptions, allowed activities must follow the  
31 critical areas standards.*  
32